IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-616

THE STATE OF NEW YORK,

Appellant,

against

CATHEDRAL ACADEMY,

Appellee.

Appeal from the Court of Appeals of the State of New York.

BRIEF FOR APPELLANT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant
The Capitol
Albany, New York 12224
Telephone: (518) 474-7138

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

KENNETH CONNOLLY
Assistant Attorney General

of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Citations to Opinions Below

The Court of Appeals of the State of New York did not render any opinion, rather the majority reversed the order of the Appellate Division of the New York Supreme Court, Third Judicial Department, on the basis of the dissenting opinion in the Appellate Division, and the dissenting judges in the Court of Appeals relied upon the majority opinion in the Appellate Division. The memorandum decision of the Court of Appeals is reported at 39 NY 2d 1021, 387 N.Y.S. 2d 246, 355 N.E. 2d 300 (printed in Appendix to Jurisdictional Statement of Appellant). The opinions of the Appellate Division are reported at 47 AD 2d 390, 366 N.Y.S. 2d 900 (printed in Appendix to Jurisdictional Statement of Appellant). The opinion of the Court of Claims of the State of New York is reported at 77 Misc 2d 977, 354 N.Y.S. 2d 370.

Jurisdiction

The appeal herein is from a final order of the Court of Appeals of the State of New York, reversing an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, which affirmed the judgment of the New York State Court of Claims dismissing the claim which had been filed pursuant to chapter 996 of the New York Laws of 1972, and which sought reimbursement for certain expenses for the 1971-72 school year which would have been made by the State but for the declaration of unconstitutionality by the Court in *Committee for Public Education and Religious Liberty* v. *Levitt* (342 F. Supp. 439 [S.D.N.Y., 1972], affd. 413 U.S. 472 [1973]) of the underlying statutory authorization for payment.

The Court of Claims had held chapter 996 unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States. The Appellate Division affirmed. The reversal by the Court of Appeals was based on the dissenting opinion of then Presiding Justice HERLIHY in the Appellate Division, which would have held the statute constitutional and the claim thereunder valid under the decision of this Court in *Lemon* v. *Kutzman* (411 U.S. 192 [referred to hereafter as *Lemon II*]), and would have had the Court of Claims adjudicate the question of whether the amounts claimed for reimbursement had been expended for purposes constituting a furtherance of the religious purposes of the claimant.

The claim here involved is one of more than 2,000 claims filed pursuant to chapter 996, and was selected for trial to test the validity of chapter 996; the remaining claims are still pending untried. The State moved to dismiss the claim, alleging its unconstitutionality under the First Amendment to the Constitution of the United States and various State constitutional grounds. The Court of Claims granted the motion to dismiss on Federal constitutional grounds. The Appellate Division's affirmance and the Court of Appeals' reversal were on the same basis, that is, the constitutionality of chapter 996 under the United States Constitution.

The order of the Court of Appeals was entered July 13, 1976. Notice of Appeal on behalf of the State of New York was filed on September 1, 1976. The appeal was docketed October 29, 1976. On February 22, 1977, this Court ordered that "Further consideration of the question of jurisdiction is postponed to the

hearing of the case on the merits."

The Supreme Court of the United States has jurisdiction to review by direct appeal the order above cited pursuant to the terms of 28 United States Code, section 1257(2).

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

> "Congress shall make no law respecting the establishment of religion * * *."

The prohibition of that amendment has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States.

Chapter 996 of the New York Laws of 1972 provides in pertinent part (the full text is set out as an appendix to this brief):

> "Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.
>
> "Sec. 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:

> (a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and the submission to the state of various other reports as provided for or required by law or regulation;
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> * * *
>
> (c) That * * * appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;
>
> * * *
>
> (e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;
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> * * *
>
> "Sec. 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable * * *."

Chapter 138 of the New York Laws of 1970, held unconstitutional by this Court in *Levitt* v. *Committee for Public Education and Religious Liberty* (413 U.S. 472), provided for payments to nonpublic schools, in the amount of $27 for each pupil in grades one through six and $45 for each pupil in grades seven through twelve, for the same examinations and record keeping services as are referred to in chapter 996.

Questions Presented for Review

1. Where a statute authorizing payments to nonpublic schools for testing and record keeping services was held to be unconstitutional by this Court as in violation of the First Amendment to the Constitution of the United States, does that declaration of invalidity bar the New York State Legislature from authorizing the filing of claims by nonpublic schools in the New York State Court of Claims for reimbursement of the payments so held to be unconstitutional for the remainder of the school year in which the statute was declared unconstitutional?

2. Regardless of the prior decision of this Court relative to the underlying statute, would the payment of the claim herein constitute a violation of the Establishment of Religion Clause of the First Amendment to the Constitution of the United States?

3. Regardless of the prior decision of this Court relative to the underlying statute, would the audit of this claim by the State Court of Claims, including an examination of the use of the funds and the services rendered in each case, as envisaged by the Court of Appeals' decision, to determine whether the reimbursement would further the religious purposes of the claimant, constitute an impermissible entaglement between church and state in violation of the Establishment Clause?

Statement of the Case

In 1970, the New York State Legislature appropriated $28,000,000 to compensate nonpublic schools for the expenses of record keeping and testing required by State law or regulation (chapter 138 of the Laws of 1970). That statute, effective July 1, 1970, was the subject of an action, commenced June 30, 1970, entitled *Committee for Public Education and Religious Liberty, et al.* v. *Levitt and Nyquist.* Appellee herein and several other nonpublic schools intervened in the action as parties defendant. Although the action was commenced before the effective date of the act, no preliminary injunction was sought, at that time to restrain payments pursuant to the statute. Consequently, appellee and other nonpublic schools received payments under the act for the entire 1970-71 school year and received the first of two payments scheduled for the 1971-72 school year. On April 11, 1972, four days before the earliest date on which the second

payment for that year could have been made, a three-judge United States District Court issued a preliminary injunction restraining the making of that payment and, on April 27, 1972, handed down a final decision in which the majority held chapter 138 to be unconstitutional as in violation of the Establishment Clause of the First Amendment to the Constitution of the United States (342 F. Supp. 439). The defendants in that case, including the State defendants and appellee herein, appealed to this Court, which affirmed the District Court judgment *(Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 [1973]).

Immediately following the District Court decision, the New York State Legislature passed a bill which became chapter 996 of the New York Laws of 1972, authorizing the New York State Court of Claims to hear and determine claims by nonpublic schools for reimbursement for the sums which they would have received in 1972, but for the District Court decision.

Appellee is one of the over 2,000 schools which filed claims aggregating approximately $11,000,000. The claim herein, for $7,347.29, represents the sum appellee would have received in the latter part of the 1971-72 school year, pursuant to chapter 138, but for the holding of unconstitutionality. This claim was selected as a test case as to the validity of chapter 996. Appellee moved for summary judgment and the State cross-moved for the dismissal of the claim.

Dismissing the claim, the State Court of Claims based its determination on the holding of this Court in the *Levitt* case, *supra,* which held that the predecessor statute of chapter 996, chapter 138 of the Laws of 1970, was unconstitutional. In so doing, that Court held (51):*

> "* * * that the implementation of chapter 996, in the form of an award of a payment to the claimant, would be constitutionally impermissible as violative of the Establishment Clause of the First Amendment to the Constitution of the United States and bases its decision upon the holdings made in the majority opinion of Mr. Chief Justice Burger in Levitt, supra."

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* Numbers in parentheses, unless otherwise indicated, refer to page numbers of the Appendix on this appeal.

The Court of Claims in the instant case found significant the discussion in this Court's opinion in *Levitt* which stated (413 U.S. pp. 479-480):

> "As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available to assure that internally prepared tests are free of religious instruction.
>
> "We cannot ignore the substantial risk that these examinations prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' *Lemon* v. *Kutzman*, 403 U.S. at 618. But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.*, at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."

The Court of Claims here also referred to that part of the Supreme Court decision which held the lump sum payments provided by chapter 138 inseparable as between constitutional and unconstitutional uses (413 U.S., pp. 481-482):

> "We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

Analyzing the provisions of chapter 138 of the Laws of 1970 and chapter 996 of the Laws of 1972, the Court of Claims found that claims pursuant to chapter 996 are based upon payment for services rendered under chapter 138 and that an award to the claimant would result in the resurrection of chapter 138 which this Court has declared to be unconstitutional (53).

The Court of Claims also considered the claimant's contention that payment under chapter 996 is authorized by the holding of this Court in *Lemon II, supra*. Rejecting that argument, the Court of Claims held (53-55):

> "As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed 'will not be applied for any sectarian purposes' (see pp. 202, 203), whereas in *Levitt* the Court found that 'the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities' (see p. 480).
>
> "In *Lemon II*, in affirming the judgment of the three-judge District Court of the Eastern District of Pennsylvania entered after remand, Mr. Chief Justice Burger, in an opinion joined in by three other justices, made a specific finding that the State funds there involved would not be applied for any sectarian purposes, stating on pages 202, 203:
>
> " 'Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding, that interest is implicated only once under special circumstances that will not recur. There is no present risk of significant intrusive administrative entaglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes. Finally, as will appear, even this simple proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971.'
>
> "The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive entaglement by the State of Pennsylvania. Such process of oversight by the state, in the form of auditing, assured that state funds

> would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned after, even assuming a cognizable constitutional interest in barring any state payments under the Pennsylvania statute, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996."

The Court of Claims in the instant action not only referred to the holding of this Court that the lump sum aid provided under chapter 138 was inseparable as between sectarian and secular uses, but also held that chapter 996 had not made that separation and did not include any standards or guidelines by which the Court of Claims could make the determination. The Court concluded that those guidelines should be established by the Legislature, not the Courts.

The Court's decision, dismissing this claim, was specifically stated not to affect claims which may have been filed by non-sectarian schools. Judgment was entered on the decision on April 22, 1974. On May 13, 1974, claimant filed a notice of appeal.

Affirming the dismissal of the claim, the majority of the Appellate Division of the State Supreme Court (HERLIHY, P.J., and LARKIN, J., dissenting) denied the applicability to the facts of the instant case of the decision of this court in *Lemon II*. Distinguishing the cases and the principles involved, the Court stated (Appendix to Jurisdictional Statement, pp. A6-A7):

> "In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirment of on-going scrutiny as above described fostered an 'excessive entaglement' between church schools and state. The validity of the payments themselves, on the facts there presented, was not determined — that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of the 'remote possibility of constitutional harm ***' *(Lemon II, supra,* 411 U.S. at 203). That remoteness was founded upon the fact that entaglements in the nature of inspection, audit, and the like had already occurred, wherefore 'payment * * * will compel no further State oversight of the instructional processes * * *'. Moreover, and perhaps more significant to a consideration

> of the case at bar, 'that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes.' *(Lemon II, supra,* 411 U.S. at 202.). In reaching this conclusion, the court took notice the existence of an 'insoluble paradox' inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entaglements of a sort prohibited by *Lemon I*. In *Lemon II*, the 'insoluble paradox' was 'avoided because the entagling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation' of the payments to be made *(Lemon II, supra,* 411 U.S. at 203, n. 3). In the case at bar, on the other hand, the paradox is squarely presented."

The Appellate Division thereupon concluded (A8):

> *"We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm.* The factor of greatest significance in leading us to this result is that in *Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, '[e]xactly how the $27 and $45 figures were arrived at is somewhat unclear.' *(Levitt, supra,* 413 U.S. at 476, n. 4.) For all its well-argued efforts to bring this case within the ambit of *Lemon II*, appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act. Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandated services, some process of audit, inspection and supervision, invalid under the standards set up in *Lemon I*, would now be required. Because of this fundamental distinction — the lack of an already-completed 'entagling'

> process — the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant's reliance arguments." (Emphasis added.)

The members of the Court who dissented would have found a valid analogy with *Lemon II* and would further have found a moral obligation on the part of the State to make the one remaining payment for the 1971-72 school year. Presiding Justice HERLIHY, in his opinion, stated (Appendix to Jurisdictional Statement, p. A11):

> "While it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the post audit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant."

It is apparent from that sentence that the dissenters overlooked the fact that in *Lemon II* the auditing function, which was the unconstitutional factor, had already been performed prior to the claim for reimbursement whereas here it would be performed as part of the reimbursement process.

The order of the Appellate Division was entered on May 6, 1975 and on May 27, 1975, Cathedral Academy filed its notice of appeal to the New York State Court of Appeals. That appeal was argued June 7, 1976 and by decision dated July 13, 1976, the Court of Appeals, by a vote of four to three, reversed the order of the Appellate Division and reinstated the claim. No opinions were written in the Court of Appeals. The majority of the Court reversed based on the dissenting opinion in the Appellate Division. The dissenting judges in the Court of Appeals adopted the majority opinion of the Appellate Division.

Summary of Argument

While the order appealed from appears to be non-final in that it reinstates a claim in the New York State Court of Claims and remands it for trial, that order is in reality final for the purpose of review by this Court since it finally determines virtually the only issue which could be presented to this Court for review, that is, whether Chapter 996 of the New York Laws of 1972 is unconstitutional and in violation of the Establishment Clause of the First Amendment to the Constitution of the United States. The Court of Claims, on remand, would have only two fact issues left to determine — the amount of state aid, computed on the basis of the number of pupils attending the school in 1972 multiplied by either $27 or $45 per pupil depending upon whether pupils in grades one through six or seven through twelve are involved, and the question which the dissenting opinion in the Appellate Division of the New York Supreme Court suggested and which was apparently adopted by the majority in the Court of Appeals, that in each case the question of the use of the funds by the schools could be tried to assure that none had been expended for religious purposes. Neither of those issues may be expected to develop additional issues of constitutional significance for review by this Court.

The second consideration as to finality also highlights an additional basis for the jurisdiction of this Court. A trial in each case, on the issues of how the funds expended for testing and record keeping had been used, to assure that none had been spent for religious purposes, would involve the Courts in the auditing of the expenditures and supervision over the nonpublic schools of funds sufficient to create an excessive entaglement between church and state, a constitutional violation over and above that created by the statute itself.

In *Levitt* v. *Committee for Public Education and Religious Liberty* (413 U.S. 472 [1973]), this Court held unconstitutional the parent statute of Chapter 996 which provided on a permanent basis the same aid provided for 6 months by Chapter 996. It is the position of appellant that this statute only revives that unconstitutional statute and is, therefore, itself in violation of the Establishment Clause.

ARGUMENT

POINT I

THIS COURT HAS JURISDICTION OF THIS APPEAL SINCE THE ORDER APPEALED FROM ITS FINAL IN EFFECT AND LEAVES NO ISSUE FOR DETERMINATION BY THE TRIAL COURT WHICH COULD ULTIMATELY BE REVIEWED BY THIS COURT. IN ADDITION, THE CARRYING OUT OF THIS DECISION OF THE NEW YORK COURT OF APPEALS WOULD INVOLVE THE COURT OF CLAIMS IN EXCESSIVE AND UNCONSTITUTIONAL ENTAGLEMENT BETWEEN CHURCH AND STATE.

A. The order appealed from is final in effect so far as issues subject to the appellate jurisdiction of this Court are concerned.

Although the order of the Court of Appeals remands the action to the New York State Court of Claims for further proceedings, those further proceedings will have no effect upon the issue presented here, the constitutionality of Chapter 996 of the New York Laws of 1972. That issue was finally determined by the Court of Appeals.

Jurisdiction of this Court on appeals from a State Court is prescribed by 28 U.S.C. § 1257(2), which provides that this Court may review final judgments or decrees, rendered by the highest Court of a state in which a decision can be had:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In the instant action, the highest Court of New York State has held Chapter 996 to be constitutional and reversed prior holdings of unconstitutionality. This appeal clearly draws in question the validity of a State statute under the Constitution of the United States; that is the only issue presented on this appeal.

Further proceedings in State Courts must be taken on the presumption that the statute is constitutional and no further State Court proceedings can question the validity of the statute under the First Amendment.

Consequently, the instant case falls within at least two of the criteria specified by this Court in its analysis of section 1257(2) in

Cox Broadcasting Corp. v. *Cohn* (420 U.S. 469, 476-487 [1975]), because "the federal issue is conclusive" (420 U.S. at 479) and because:

> "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." (420 U.S. at 480.)

To all practical intents and purposes then, the decision of the Court of Appeals is final for the purposes of appeal to this Court and this Court, therefore, has jurisdiction of the appeal.

B. The carrying out of the decision of the New York Court of Appeals would require an in depth examination by the Court of Claims of the services for which reimbursement is made resulting in an excessive entanglement between church and state.

Chapter 138 of the New York Laws of 1970, the statute declared unconstitutional by the Court in *Levitt, supra,* provided for a reimbursement of $27 per pupil in elementary grades and $45 per pupil in higher grades to non-public schools as compensation for record keeping and testing services required by State law or regulation.

Holding the statute unconstitutional in *Levitt,* this Court held that teacher-prepared tests, as distinguished from State — prepared tests, were an integral part of the teaching process and could be used to further the religious purposes of the non-public schools. While the Court appeared to find no fault with compensation for the costs of administering State prepared tests, the Court found no basis upon which the lump sum payments could be judicially segregated to compensate for the ideologically neutral services, holding that segregation was a legislative, not a judicial function.

The New York State Legislature in enacting Chapter 996 of the Laws of 1972 made no such segregation, nor did it establish guidelines whereby the Court of Claims could segregate the funds provided in the 1972 act from the payments held invalid with respect to the 1970 acts. On the contrary, the Court of Claims is authorized to "hear, audit and determine" the claims of the non public schools.

The dissenting opinion in the Appellate Division, which by reason of its adoption by the majority in the Court of Appeals has

become the prevailing opinion, observed that the post audit to be performed in these cases by the Court of Claims "will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant." (Appendix to Juris. Statement, All).

That fact can only be established by an examination of the nature and use of all teacher prepared tests used in claimant schools in 1972. It will require a surveillance by the Court to determine that no compensation is rendered for testing services where the tests were used to teach religion or religious principles. This, we submit, is clearly excessive entanglement between church and state.

The opinion of this Court in *Walz* v. *Tax Commission of New York City* (397 U.S. 664 [1970]), while rendered in a case involving tax exemption of church-owned property and not on the issue of direct financial aid to sectarian institutions, sets forth certain considerations to be employed in testing whether particular legislation violates the First Amendment. The test, as phrased by Chief Justice BURGER, is two-pronged (669):

> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."

The Court's decision focuses on whether the statute fosters "excessive entaglement" between government and religious institutions. Such entaglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinent to this action, in discussing the alternatives of taxing or exempting church property, the Chief Justice observed (675):

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for the enforcement of statutory or administrative standards * * *."

That decision makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but

whether the degree of entanglement required by the statute is likely to promote the substantive results against which the First Amendment guards.

Applying that decision, this Court in *Lemon* v. *Kurtzman (Lemon I)* (403 U.S. 602 [1971]) held invalid a Pennsylvania statute providing for payments to non-public schools of the costs of teaching certain secular subjects. The extensive auditing provisions, to insure that no State funds were used for religious purposes, this Court found to constitute excessive entanglement between Church and State.

Lemon I involved statutes of two states, Rhode Island and Pennsylvania, which provided subsidies for teachers in non-public schools and the statute of one State, Pennsylvania, which provided for the purchase of secular educational services from non-public schools by public school districts. This Court held all three statutes unconstitutional because they fostered an excessive entanglement between church and state in the efforts necessary to prevent compensation for sectarian education. In so holding, the Court's opinion discusses the nature of prohibited contacts (403 U.S. at 615):

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, in a separate opinion in *Walz, supra,* echoed the classic warning as to 'programs, whose very nature is apt to entangle the state in details of administration * * *.' Id., at 695."

With respect to the Rhode Island program, the Court observed that, as to certain schools, it was necessary to examine a school's records to determine how much of its expenditures are for secular activity and how much for religious purposes, just as in the instant case, the Court of Claims must examine the tests administered by the schools and their cost to determine how much is attributable to the furtherance of the religious purposes of the school. As to those examinations, this Court said (403 U.S., at 620):

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a

> relationship pregnant with dangers of excessive government direction of church schools and hence of churches."

The same rationale clearly applies in the instant case. The examination by the Court of Claims into the nature of the services being compensated for, including the subject matter of tests administered by the schools, is "fraught with the sort of entanglement that the Constitution forbids."

The original 1970 statute provided only for lump sum per pupil payments which involved no such auditing function. The Court of Appeals, in adopting the dissenting opinion in the Appellate Division, had rejected a new element of unconstitutionality by providing for an audit by the Court of Claims into the uses of the money.

The constitutionality of that new element should be determined prior to the exercise of that auditing function by the Court since such pervassive "governmental power will ultimately intrude on religion" (403 U.S. at 620). For that reason too this Court has jurisdiction of this appeal.

POINT II

AN AWARD TO APPELLEE OF MONEYS REPRESENTING PAYMENTS DUE UNDER CHAPTER 138 OF THE LAWS OF 1970, A STATUTE PREVIOUSLY HELD UNCONSTITUTIONAL, WOULD HAVE THE PRIMARY EFFECT OF SUPPORTING A RELIGIOUS INSTITUTION IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

Chapter 996 of the Laws of 1972 initially confers jurisdiction on the Court of Claims to "hear, audit and determine" claims of non-public schools for reimbursement of funds expended by those schools in record keeping and testing as required by State law or regulation. However, those claims are specifically limited to unpaid sums for the 1971-72 school year; moneys which were payable pursuant to chapter 138 of the Laws of 1970. The projected awards by the Court of Claims are in substitution for moneys enjoined from payment upon a finding of the unconstitutionality of the underlying statute — chapter 138 of the Laws of 1970 *Levitt* v. *Committee for Public Education and Religious*

Liberty, 413 U.S. 472 [1973], affg. 342 F. Supp. 439).

The enabling act, pursuant to which the claim which is the subject of this action was filed, merely revived an unconstitutional statute and is subject to the same constitutional infirmities.

Appellee, Cathedral Academy, is uncontrovertably under the jurisdication of the Roman Catholic Diocese of Albany. The corporate entity to which payments under chapter 138 were made was the Albany Diocesan School Board, Inc. The affidavit in support of claimant's motion for summary judgment was made by the Vice President of the Cathedral of the Immaculate Conception. The Court of Claims decided the case and the Appellate Division affirmed based upon the unquestioned and uncontroverted assumption that appellant is a sectarian school.

The issue here is, fundamentally, whether, regardless of the guise under which the taxing power is invoked, the State may constitutionally use that power to furnish direct financial assistance to non-public schools which are controlled in whole or in part by religious denominations or in which denominational doctrines are taught.

Every discussion on the impact of the First Amendment upon a state's taxing power begins with *Everson* v. *Board of Education* (330 U.S. 1 [1947]). It is, therefore, also necessary to begin our inquiry on that issue with an analysis of that case.

At issue in *Everson* were the provisions of a New Jersey statute permitting local school boards to provide transportation for students attending church schools. Mr. Justice BLACK, speaking for the majority of this Court, defined the scope of the Establishment Clause as follows (pp. 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." (Emphasis added.)*

The opinion further states (p. 16):

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."

Fundamental to the concept of religious freedom, as envisaged by the Framers of the First Amendment, was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony had published a pamphlet against the then existent church tax, arguing that such a method of supporting religion was immoral and contrary to justice (Cobb, *The Rise of Religious Liberty in America,* p. 170 [1902]). As the Court said in *Everson* (330 U.S., p. 11):

> "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."

The Court then referred to the struggle against the tax levy for religion in Virginia; Madison's *Memorial and Remonstrance,* which led to the success of that struggle; and Jefferson's Statute for Establishing Religious Liberty, which was a product of that controversy. It is significant that much of the *Memorial and*

Remonstrance is framed in terms of religious liberty. Indeed, its very opening invokes the freedom of religion clause of the Virginia Declaration of Rights, as does its close. It is significant, too, that defeat of the tax levy led immediately to the enactment of the State for Establishing Religious Liberty, whose principal provision is that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. • • •"

The Establishment Clause of the Federal Bill of Rights was based upon the awareness of the historical fact that governmentally established religions and religious persecution go hand in hand and on the belief that a union of government and religion tends to destroy government and degrade religion *(Engle* v. *Vitale,* 370 U.S. 421 [1962]).

While four Justices in *Everson* disagreed over the application of these principles to the facts of the case before them, it is important to observe that all of the dissenters agreed as to the principles therein defined. What is more, this definition of principle has been repeated and reaffirmed repeatedly since that decision (See, *e.g., Illinois ex rel. McCollum* v. *Board of Education of School District No. 71,* 333 U.S. 203 [1948]; *McGowan* v. *Maryland,* 366 U.S. 420 [1961]; *Torcaso* v. *Watkins,* 367 U.S. 488 [1961]; *Board of Education* v. *Allen,* 392 U.S. 236 [1968]).

When he came to the application of the principle to the New Jersey statute, Mr. Justice BLACK concluded (p. 18):

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

The application of the *Everson* doctrine to the instant case is clear and unquestionable. Here the State *would* contribute money to the sectarian school; it *would* support them, even if only once, by the payment of funds which would have been paid in 1972 except for the Federal Court injunction. A tax would be raised for the support of such schools and thus, for the support of the religion they teach.

In *McCollum, supra,* this Court held it unconstitutional to allow the use of public school premises for sectarian teachings.

The Court repeated that: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (333 U.S., p. 210).

In *Zorach* v. *Clauson* (343 U.S. 306 [1952]), this Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, because no expenditure of public funds or use of public buildings was involved. The court said (at p. 314): "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education. * * *"

In *Engle* v. *Vitale* (370 U.S. 421 [1962]), this Court, holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated (at p. 431) that when "the power, prestige and financial support of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. The Court quoted from Madison's *Memorial and Remonstrance* (at p. 436), that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

A further test as to the validity of statutory enactments relative to interaction between Church and State, was set forth by this Court in *Abington School District* v. *Schempp* (374 U.S. 203 [1963], a case involving a State law requiring daily Bible reading in the schools, wherein the Court stated (p. 222):

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

While the *purpose* of the statute here in question might not be the advancement of religion, the *primary effect* of monetary aid to sectarian schools, particularly so long after the funds to be

reimbursed were spent, would be the advancement of the religious function of the schools and thus, such aid would be barred by the terms of the First Amendment. This Court's decision in *Abington* continued (pp. 216-217):

> "* * * this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in *Everson, supra,* at 15, the Court said that '(n)either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.' And Mr. Justice Jackson, dissenting, agreed:
>
> " 'There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitition was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity.' *Id.,* at 26.
>
> "Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:
>
> " 'The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for relgion.' *Id.,* at 31-32.
>
> "The same conclusion has been firmly maintained ever since that time, see *Illinois ex rel. McCollum, supra,* at pp. 210-211; *McGowan* v. *Maryland, supra,* at 442-443; *Torcaso* v. *Watkins, supra,* at 492-493, 495, and we reaffirm it now."

In the *Abington* case, in his concurring opinion, Mr. Justice DOUGLAS emphasized (374 U.S., at p. 229):

> "The most effective way to establish any institution is to finance it, and this truth is reflected in the appeals by Church groups for public funds to finance their religious schools."

Mr. Justice CLARK's test, first set out in *Abington,* was amplified by the Justice himself in *Religion and the Law* (15 S.C.L. Rev. 855, 859 [1963]):

> "The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and where there is some working arrangement between the two • • • Finally, the term includes the furnishing of funds for facilities by the state where the purpose and primary effect is to advance religion."

But even if we consider the formula used in *Abington* independently of the language of *Everson,* the conclusion as to the statute here at issue must be the same as that reached on the basis of the criteria set forth in *Everson.* Furthermore, the primary effect of a state law which provides financial aid to sectarian institutions is to aid the institution and the denomination which controls it.

Prior to the enactment of chapter 138 of the Laws of 1970, the non-public schools were required to provide record keeping and examination services to the State at their own expense, and since the determination in *Levitt,* they have been required to do so again.* Funds paid pursuant to chapter 138, the Courts held, compensated the schools for a portion of the costs of administering the teaching functions of the schools. This, Court in *Levitt* held to violate the Establishment Clause of the First Amendment.

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* By chapters 507 and 508 of the Laws of 1974, non-public schools are being reimbursed for the actual expenses of required record keeping and administration of *State* prepared and mandated examinations. These statutes were held unconstitutional by the United States District Court for the Southern District of New York in *Committee for Public Education and Religious Liberty* v. *Levitt* and are now the subject of an appeal to this Court which was docketed October 29, 1976.

Such aid shifts a portion of the cost of running such schools from the religious denomination which owns them to the State. Therefore, the effect of such legislation is to facilitate the maintenance of sectarian schools by religious groups. Since these schools are established to advance religion, the effect of state finance aid to sectarian institutions is advancement of religion. Hence, *Abington,* if anything, strengthens the conclusion that a law providing financial aid to sectarian is "an establishment of religion" in violation of the First Amendment.

Appellee in the instant case bases its allegations of validity of chapter 996 of the Laws of 1972 on the decision of this Court in *Lemon II (Lemon* v. *Kurtzman,* 411 U.S. 192 [1973]). The New York Court of Claims, however, clearly set out the distinguishing features between this case and that in *Lemon II,* distinctions which are persuasive as to a result of unconstitutionality in this case. The Trial Court here held:

> "Despite the holding in *Levitt,* claimant urges that *Lemon II* stands for the proposition that, even though a state statue may have been struck down under the Establishment Clause, nevertheless, when a claimant relies thereon, prior to the finding of unconstitutionality, in performing certain services with the expectation of reimbursement, which is not forthcoming, then, in right, justice, law and equity claimant should be reimbursed. As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed 'will not be applied for any sectarian purposes' (see pp. 202, 203), whereas in *Levitt* the Court found that 'the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities' (see p. 480).
>
> "In *Lemon II,* in affirming the judgment of the three-judge District Court of the Eastern District of Pennsylvania entered after remand, Mr. Chief Justice Burger, in an opinion joined in by three other justices, made a specific finding that the State funds there involved would not be applied for any sectarian purposes, stating on pages 202, 203:
>
> " 'Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding, that interest is implicated only once under special circumstances that will not recur. There is no present risk of

significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools, is a thing of the past. At the same time, that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes.[3] Finally, as will appear, even this single proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971.'

"The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive entanglement by the State of Pennsylvania. Such process of oversight by the State, in the form of auditing, assured that State funds would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned that, even assuming a congnizable constitutional interest in barring any state payments under the Pennsylvania statue, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996."

" '3. See Lemon I, supra:

"If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissention." 403 U.S., at 640, 29 L Ed 2d 745 (concurring opinion of Douglas, J.).

" 'The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.' id., at 668, 29 L Ed 2d 783 (dissenting opinion of White, J.).

" 'Here, the "insoluable paradox" is avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into our present evaluation of the constitutional interests at stake in the proposed payment.' "

Rejecting the applicability of *Lemon II* to this case, the majority of the Appellate Division (in the opinion adopted by the dissenters in the Court of Appeals) held (Jurisdicational Statement, pp. A6-A9):

"In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirement of on-going scrutiny as above described fostered an 'excessive entanglement' between church schools and state. The validity of the payments themselves, on the facts there presented, was not determined — that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of 'the remote possibility of constitutional harm * * *' *(Lemon II, supra,* 411 U.S. at 203). That remoteness was founded upon the fact that entanglements in the nature of inspection, audit, and the like had already occurred, wherefore 'payment * * * will compel no further State oversight of the instructional processes * * *'. Moreover, and perhaps more significant to a consideration of the case at bar, 'that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes.' *(Lemon II, supra,* 411 U.S. at 202). In reaching this conclusion, the court took notice of the existence of an 'insoluble paradox' inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entanglements of a sort prohibited by *Lemon I*. In *Lemon II*, the 'insoluble paradox' was 'avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation' of the payments to be made *Lemon II, supra,* 411, U.S. at 203, n.3). In the case at bar, on the other hand, the paradox is squarely presented.

"We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm. The factor of greatest significance in leading us to this result is that in

Levitt, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, '[e]xactly how the $27 and $45 figures were arrived at is somewhat unclear'. *(Levitt, supra,* 413 U.S. at 476, n. 4.) For all its well-argued efforts to bring this case within the ambit of *Lemon II*, appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act.[3] Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandates services, some process of audit, inspection and supervision, invalid under the standards set up in *Lemon I*, would now be required.[4] Because of this fundamental distinction — the

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"3. In addition to the distinction based on the fact that the decision in *Lemon I* did not invalidate the payments per se under the Pennsylvania statute, it is also noteworthy that the Federal Court there undertook to fashion an equitable remedy by carving out an exception to the scope of the injunction. Here, the Federal court has not seen fit to do so; the injunction against payments stands, without limitation."

"4. Presiding Justice Herlihy, arguing in his dissent that reimbursement should be permitted because of the reliance by the schools upon the expectation of payment, is of the view that reimbursement should be in such amount as would be determined by the trial court to equal the expenditures incurred in performing the services. This amount, as previously suggested, may be markedly different from the amount which appellant and others might have expected under the Mandated Services Act formula. We are unable to agree with the contention that because appellant and others similarly situated relied upon being paid in an amount determined according to that formula, they should be entitled to reimbursement in an amount which bears no demonstrated relationship to the payments which would have been forthcoming under that formula."

lack of an already-completed 'entangling' process — the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant's reliance arguments.

"Appellant argues, however, that those constitutional interests, just as the interests in *Lemon II*, will be 'implicated only once under special circumstances that will not recur' *(Lemon II,* 411 U.S. at 202). In *Lemon II*, however, a constitutional interest arising from the payments was assumed for the purpose of discussion, since the constitutionality of the statute in *Lemon I* had not turned upon the invalidity of the payments per se, whereas in the present case, the constitutional interest is more tangible because of the invalidation of the payments under *Levitt*. Moreover, in this case, a further constitutional interest will be implicated because of the need for State oversight in the form, at the very least, of an audit process."

The Court of Claims, the majority in the Appellate Division and, *per force*, the dissenters in the Court of Appeals, correctly refused to apply *Lemon II* to the statute at issue in the instant case. Whereas in *Lemon II* the auditing function had been the unconstitutional element which had terminated prior to the claim for payment at issue there, in the instant case it was the purpose for which payments were made which rendered chapter 138 unconstitutional and the payments under chapter 996 would be made for the same unconstitutional purpose. The fact that only one payment is involved is immaterial. A statute cannot be "a little bit unconstitutional".

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE ORDER BELOW SHOULD BE REVERSED AND THAT JUDGMENT SHOULD BE ENTERED HOLDING CHAPTER 996 OF THE NEW YORK LAWS OF 1972 TO BE UNCONSTITUTIONAL AND INVALID.

Dated: April 6, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant
The Capitol
Albany, New York 12224
Telephone: (518) 474-7138

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

KENNETH CONNOLLY
Assistant Attorney General

of Counsel

APPENDIX — Chapter 996 of the 1972 Laws of New York.

Claims Against State — Nonprofit Schools
Chapter 996

An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.

Approved and effective June 8, 1972.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

§2. In hearing, auditing and determing such claim or claims, the court of claims is hereby authorized to consider, inter alia:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and

inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

> "That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.
>
> That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.
>
> That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.
>
> And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to

reimburse such schools for the rendering of such services;

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

§3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be

filed with the court of claims within ninety days from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

§4. This act shall take effect immediately.